NO. 83-438

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1983

WILBURN A. HENDERSON PETITIONER

VS.

STATE OF ARKANSAS RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

STEVE CLARK
Attorney General

By: LESLIE M. POWELL
MARCI TALBOT
Assistant Attorneys General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I.

WHETHER ARK. STAT. ANN. SECTION 41-1501, ARKANSAS' CAPITAL MURDER STATUTE, BY OVERLAPPING WITH ARK. STAT. ANN. SECTION 41-1502, THE FIRST DEGREE MURDER STATUTE, VIOLATES EIGHTH AND FOURTEENTH AMENDMENT PROTECTIONS AS SET FORTH IN FURMAN V. GEORGIA, 408 U.S. 238 (1972)?

II.

WHETHER PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY WHEN NO JURORS WERE EXCUSED FOR CAUSE BASED UPON THEIR VIEWS ON THE DEATH PENALTY?

III.

WHETHER AN ALLEGED VIOLATION OF RULE 404, UNIFORM RULES OF EVIDENCE, ARK. STAT. ANN. VOL. 3A (REPL. 1979) ARISES TO A VIOLATION OF DUE PROCESS OF LAW?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES & CONSTITUTIONAL PROVISIONS

OPINIONS BELOW

The opinion of the Arkansas Supreme Court affirming petitioner's conviction and death sentence is reported at Henderson v. State, 279 Ark. 414, 625 S.W.2d 533 (1983). A copy of this opinion is included in petitioner's appendix.

JURISDICTIONAL STATEMENT

Respondent agrees that this Court has discretionary jurisdiction to review this case.

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable constitutional provisions and statutes are found in petitioner's brief at pages 2-3.

STATEMENT OF THE CASE

On February 9, 1981, petitioner was charged by information with the capital murder of Willa O'Neal. The events which lead to this charge are outlined as follows: At approximately 2:00 p.m. on November 26, 1980, Willa O'Neal was robbed and murdered while working in her family owned furniture store in Fort Smith, Arkansas. The autopsy revealed that she had been shot once in the head with a .22 caliber pistol and died instantly. The police arrived at the crime scene at about 2:15 p.m. and found the victim lying face down behind the counter. The cash register was open, and at least $41 was missing.

One of the police detectives who investigated the murder found a piece of paper on the floor, about six feet from the victim's body. The victim's daughter testified that it had not been there when

she was in the store at 1:40 p.m. that afternoon. It was this piece of paper which lead to the development of appellant as a suspect in this case. The paper contained a drawing of a floor plan, 2 phone numbers, an address, and the name of a real estate agent. The police contacted the real estate agent, who recognized the floor plan as that of a cabin he was trying to rent. Further investigation revealed that appellant had looked at the cabin and had had an appointment with the agent to talk about renting it at 4:30 p.m. on the day of the crime. Appellant failed to keep the appointment. He was eventually traced to Houston, where he gave a statement to the Fort Smith police admitting he was in the store at the time of the murder, but stating that an acquaintance killed the victim. The acquaintance was questioned, released and later testified at trial.

Further incriminating evidence which was introduced at trial included the fact that appellant had redeemed a pawned .22 caliber pistol on November 24 but had pawned the pistol on November 29, and the fact that when appellant left for Houston, he abandoned the van he was driving on the day of the murder. A female acquaintance testified that appellant acted peculiarly when a television report gave a description of the subject sought in the murder. She also testified that appellant told her the Fort Smith police were looking for him regarding a murder and to tell the police, if they asked, that he had telephoned from Kansas City. In addition, she was to say that he still had his moustache, even though he had shaved it off.

The jury convicted petitioner of capital murder, and he was sentenced to death by electrocution pursuant to Ark. Stat. Ann.

§41-803 (Repl. 1977). The jury found two aggravating circumstances: (1) That the capital murder was committed by someone that had previously committed an offense involving the use of or threat of force or serious physical injury to another person; and (2) that the capital murder was committed for pecuniary gain.

On appeal, the Arkansas Supreme Court affirmed petitioner's conviction and sentence in a 7-0 decision. Petitioner now brings this petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE OVERLAPPING LANGUAGE OF ARKANSAS' CAPITAL AND FIRST DEGREE MURDER STATUTES DID NOT RENDER PETITIONER'S CONVICTIONS UNCONSTITUTIONAL.

Petitioner alleges that the overlapping of Arkansas' capital and first degree murder statutes renders the Arkansas statutory scheme unconstitutional, contending that juries have no "meaningful guidance" in determining if the defendant is death eligible. This issue has been considered on numerous occasions by the Arkansas Supreme Court and has been consistently rejected. See, Collins v. State, 259 Ark. 8, 531 S.W.2d 13 (1975); vacated in part, 429 U.S. 808 (1976), aff'd on remand, 261 Ark. 195, 548 S.W.2d 106, cert. denied, 434 U.S. 878 (1977); Ruiz and Denton v. State, 273 Ark. 94, 617 S.W.2d 6, cert. denied,

454 U.S. 1093 (1981). See also Collins v. Lockhart, 545 F.Supp. 83 (E.D. Ark. 1982).

The Arkansas Supreme Court stated in Collins v. State, supra:

> We find that the Arkansas system of prosecuting and sentencing those found guilty of a charge of capital felony murder provides adequate safeguards against arbitrary, capricious or freakish imposition of the death penalty to successfully pass constitutional examination in the light of the Eighth and Fourteenth Amendment standards ascertainable from the Woodson-Roberts-Gregg-Proffit-Jurek quintuplet offspring of Furman.

In Cromwell v. State, 269 Ark. 104, 598 S.W.2d 733 (1980), the Arkansas Supreme Court held that there was no constitutional infirmities in either the overlapping of the capital murder and first degree murder statutes or in the reasonable exercise of discretion by a prosecuting attorney in determining which crime to charge.

The United States Supreme Court has reached an almost identical issue in United States v. Batchelder, 442 U.S. 114 (1979), in which the defendant alleged prejudice because he was convicted under one of two federal gun control statutes which were worded identically but provided different punishments. The Court held such provisions are not void for vagueness and did not constitute due process or equal protection violations.

> The provisions in issue here, however, unambiguously specify the activity proscribed and the penalties available upon conviction.... That this particular conduct may violate both titles does not detract from the notice afforded each. Although the statutes create uncertainty as to which crime may be charged and therefore what penalties may be imposed, they do so to no greater extent than would a single statute authorizing various alternative punishments. So long as overlapping criminal provisions clearly define the conduct prohibited and the punishment authorized, the notice requirements of the Due Process Clause are satisfied. 442 U.S. at 123.

The Court further approved the fact that prosecutorial discretion is involved in selecting which crime is charged. Id. at 124.

Juries are customarily given some discretion in sentencing. In capital cases the jury's discretion must be guided in a rational manner. Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Beck v. Alabama, 447 U.S. 625 (1980) makes it clear that the facts of a given case may support the finding by a jury that any one of several offenses were committed by a defendant and that a defendant must be given the opportunity to be sentenced for a lesser offense if the facts warrant it.

No defendant charged and tried for capital murder could be prejudiced because the jury could also consider first degree murder as a lesser included offense. The

only possible result to a defendant would be an opportunity for leniency. Where there is no doubt that the evidence supports a conviction for capital murder, and where the statutory guidelines for conviction and sentence meet constitutional muster, a defendant cannot complain that he is convicted of that offense. See Batchelder, 442 U.S. at 123.

In summary, respondent submits that the Arkansas statutory scheme in this regard is constitutional and certiorari in this case should be denied.

II.

NO PERSON OPPOSED TO THE DEATH PENALTY WAS EXCLUDED FOR CAUSE FROM PETITIONER'S JURY PANEL AND HE WAS NOT DENIED HIS RIGHT TO A JURY COMPOSED OF A CROSS SECTION OF THE COMMUNITY.

As mentioned in the opinion of the Arkansas Supreme Court, petitioner argued on appeal and here argues that it was error

to exclude for cause a juror who could not under any circumstances impose the death penalty. An examination of the record reveals that no person on petitioner's jury panel was excused for cause based on their views on capital punishment. Each veniremen was either: (1) accepted without objection as a juror; (2) excused for cause on submission by petitioner; (3) excused for cause based on some ground other than their views regarding the death penalty; or (4) excused by peremptory challenge by one of the parties.

Petitioner's jury panel was selected by the random selection process. The random selection process does not guarantee a proportionately accurate cross section of the community to match the demographics of an area. See Swain v. Alabama, 380 U.S. 202 (1965) To establish a violation of the fair cross section requirement of the Sixth

Amendment, a defendant must first make a prima facie showing of the distinctiveness of a group that it is underrepresented on the venire and that its members have been subject to systematic exclusion. See Duren v. Missouri, 439 U.S. 357 (1979) Respondent submits that the petitioner failed to meet any part of this burden of proof. As no juror was excused for cause based on their views of capital punishment, even Witherspoon v. Illinois, 391 U.S. 510 (1968) is not applicable to this case.

Respondent is well aware of the holding in Grigsby v. Mabry, ___ F. Supp. ___ (E.D. Ark. August 5, 1983) which is currently on appeal to the United States Court of Appeals for the Eighth Circuit. Though a cross-section violation was found in that case where jurors were excluded for cause pursuant to Witherspoon, respondent submits that even if upheld on appeal Grigsby

does not apply to the circumstances present in the instant case where no jurors were so excused.

Both the petitioner and the State are entitled to a fair and impartial jury which will consider the full range of penalties. Jurors may properly be questioned as to whether they will consider all the penalties provided by law. Witherspoon v. State, supra; Stephens v. State, 277 Ark. 113, 640 S.W.2d 94 (1982); Haynes v. State, 270 Ark. 685, 606 S.W.2d 563 (1980). In Haynes, the Arkansas Supreme Court held that the prosecuting attorney had exceeded the proper bounds of voir dire by attempting to commit jurors to the maximum penalty prior to the trial of the case. In Stephens, the Arkansas Supreme Court affirmed a case in which the jury panel had been extensively questioned as to whether they would consider the entire range of penalties and

where a venireman was excused for cause upon stating that he would not impose the maximum under any circumstances. Jury selection in Stephens and other non-capital cases is no different from jury selection in a capital case.

This issue is without merit. Respondent submits that petitioner was tried by an impartial jury which represented a fair cross section of the community. The jury first determined petitioner's guilt and following the presentation of additional evidence determined the appropriate sentence pursuant to Ark. Stat. Ann. §41-1301 et seq. (Repl. 1977). Petitioner has failed to establish any constitutional violation in the process of jury selection or trial of his case.

III.

THERE WAS NO VIOLATION OF RULE 404 OF ARKANSAS' UNIFORM RULES OF EVIDENCE, & ANY ALLEGED EVIDENTIARY ERRORS DID NOT ARISE TO A VIOLATION OF DUE PROCESS OF LAW.

Petitioner contends that the alleged failure of the state judicial system to enforce Rule 404, Uniform Rules of Evidence, Ark. Stat. Ann. Vol. 3A (Repl. 1979) deprived him of a fair trial and due process of law. In response to this argument respondent submits that Rule 404 was not violated, and even if it were, any error was harmless beyond a reasonable doubt. Furthermore, any such alleged error did not arise to a violation of due process.

Rule 404 provides that evidence of a person's character is not admissible except in limited circumstances not applicable here. Petitioner complains that this rule was violated by the fact the prosecutor cross

examined petitioner about a former wife, about an alias name, and whether or not he was a reverend.

Respondent submits that evidence of a previous marriage of petitioner is not "character evidence" within the meaning of Rule 404. Nor is the fact petitioner was known as a reverend. Respondent contends that reference to being a reverend was, if anything, to petitioner's benefit. Moreover, there was no objection to this question, so it was not properly preserved for appeal. Wainwright v. Sykes, 433 U.S. 477 (1972); Wicks v. State, 270 Ark. 781, 606 S.W.2d 366 (1980).

Petitioner was also asked on cross examination who "Anthony Santana" was, and after an objection that was overruled, answered that it was an alias name for him used by the police. Resondent contends that evidence of an alias name was not

"character evidence" within the meaning of the rule, and even if it were, it was harmless error beyond a reasonable doubt. Petitioner had already admitted on direct examination that he was a felon, and therefore the fact the police knew him by an alias name could not have been prejudicial.

On appeal to the Arkansas Supreme Court it was argued that the above questions were irrelevant and prejudicial. The Court held that it could not say from an examination of the record that these questions, standing alone, constituted prejudicial error.

Petitioner alleges, however, that such evidence was prejudicial unless it could be held "harmless beyond a reasonable doubt," implying that the Arkansas Supreme Court did not use that standard. Respondent submits that such is the standard used by the Court even though the language used

varies occasionally. See Pace v. State, 265 Ark. 712, 580 S.W.2d 689 (1979). Respondent also notes that harmless error has been found on other death penalty cases. Ford v. State, 276 Ark. 98, 633 S.W.2d 3 (1982), cert. denied, 103 S.Ct. 389, 74 L.Ed.2d 519 (1982).

Moreover, it is well settled that the admissibility of evidence is usually a matter of state law and procedure and does not involve federal constitutional issues. Davis v. Campbell, 608 F.2d 317 (8th Cir. 1979); Schliecher v. Wyrick, 529 F.2d 906 (8th Cir. 1976). It is not the function of the federal court to be an appellate arm of the State, but rather to make inquiry into whether the constitutional rights of the petitioner were safeguarded at his state criminal trial. Walker v. Bishop, 295 F.Supp. 767 (E.D. Ark. 1967); aff'd 408 F.2d 1378 (8th Cir. 1969). A justifiable

federal issue is presented only where trial errors infringe upon a specific constitutional protection or are so prejudicial as to amount to a denial of due process. Davis v. Campbell, supra, citing Cooper v. Campbell, 597 F.2d 628 (8th Cir. 1979).

The evidentiary issue which petitioner raises in this case, even if error, is not so prejudicial so as to amount to a denial of due process and thereby does not require reversal by a federal court. A case on point is Hackworth v. Beto, 434 F.2d 852 (5th Cir. 1970) in which petitioner alleged that the State improperly introduced character testimony against him. The court agreed, but held that these apparent errors in the trial were not so serious so as to constitute a violation of due process of law, stating that "the proceedings were, on the whole, fundamentally fair." Hackworth v. Beto, supra, at 854.

Here also, the proceedings were fundamentally fair. The Arkansas Supreme Court specifically reviewed the sufficiency of the evidence and concluded that it was sufficient upon which to base the conviction. The Court reviewed all objections decided adversely to petitioner and concluded there was no error, and further stated there was no evidence that the jury's verdict was based on passion or prejudice, or that the imposition of the death penalty was arbitrary or capricious.

In summary, respondent submits that no violation of Rule 404 occurred, and the alleged errors, if any, were harmless beyond a reasonable doubt. Clearly, the proceedings were fundamentally fair, and petitioner's alleged errors do not arise to a violation of due process. For these reasons certiorari should be denied by this Court.

CONCLUSION

Rule 17.1 of the Rules of the Supreme Court states that review on writ of certiorari will only be granted when there are special and important reasons therefor. This case contains no issues worthy of such review. Respondent respectfully submits that the Arkansas Supreme Court has followed the applicable decisions of this Court and has properly denied petitioner relief in his direct appeal. Therefore, for these reasons, and for the reasons and authorities cited in respondent's brief in opposition to the petition for writ of certiorari, respondent respectfully prays that this Court deny review on writ of certiorari.

Respectfully submitted,

JOHN STEVEN CLARK
Attorney General

By: LESLIE M. POWELL
MARCI TALBOT
Assistant Attorneys General
Justice Building
Little Rock, Arkansas 72201
(501) 371-2007

ATTORNEYS FOR
RESPONDENT

CERTIFICATE OF SERVICE

We, Leslie M. Powell and Marci Talbot, Assistant Attorneys General, do hereby certify that two copies of Brief for Respondent in Opposition to Petition have been served on petitioner herein by mailing a copy of same, postage prepaid, to Mr. Thomas M. Carpenter, 807 W. Third St., Little Rock, Arkansas, 72201, this 11th day of November, 1983.

Leslie M Powell
LESLIE M. POWELL

Marci Talbot
MARCI TALBOT
Assistant Attorneys General

APPENDIX

STATE OF ARKANSAS

vs. CR 81-46

WILBURN A. HENDERSON

SEBASTIAN CIRCUIT COURT

TRANSCRIPT

MR. FIELD CONTINUES:

Q. Who is The Reverend W. A. Henderson?

A. Myself.

Q. Okay, are you a reverend?

A. Yes, I am.

Q. And who is Anthony Santana?

A. At one time---

MR. SETTLE: Your Honor, I object to this. I don't know what the relevance is and would like to approach the bench. MR. FIELDS: Your Honor, we could tell him. MR. SETTLE: Your Honor, can we approach the bench? I'd like to know the relevance. (The following discussion is at side bar, outside the hearing of the jury):

MR. SETTLE: What does Mr. Fields think he's trying to do? I mean this isn't cross examination. He's making a circus out of this thing.

THE COURT: Who is this last fellow?

MR. FIELDS: It's him.

MR. SETTLE: No, it isn't.

MR. FIELDS: It's a name he has gone by. He said under oath that his name was W. A. Henderson. He's going to say that. If he doesn't we can prove it.

MR. SETTLE: That I'd like to see. How can you prove it?

MR. FIELDS: It's a name he had gone under. If he says "No," we can prove it. We've got the documents.

THE COURT: I think he'd be entitled to ask it.

MR. FIELDS: Thank you.

MR. SETTLE: Note my exception.

(Discussion at side bar is concluded)

MR. FIELDS CONTINUES:

Q. Who is Anthony Santana?

A. I believe it's an alias the Police Department put on me one time.

Q. It's a name you went by?

A. Not that I know of.

Q. You've never heard the name before?

A. I've heard it before.

Q. You've never used that name?

A. Not that I know of. . . . (T. 1512-1513)